Not intended for print publication

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ERIC P. MANTZ, M.D., et al,

Plaintiffs,

v. CIVIL ACTION NO. 2:03-0506

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, et al,

Defendants.

ORDER

Pending before the court are: (1) the motion of the plaintiffs for summary remand, or in the alternative, expedited consideration of their motion to remand [Docket 11], and (2) the motion of the defendants to dismiss [Docket 5]. For the reasons discussed below, the plaintiffs' motion for summary remand is **GRANTED**, and the defendants' motion to dismiss is **DENIED AS MOOT**.

I. Discussion

This case was initially filed on March 22, 2002 in the Circuit Court of Kanawha County, West Virginia. The parties at that time were the three current named West Virginia plaintiffs, Dr. Eric P. Mantz, M.D., Dr. S. Willis Trammell, M.D., and Dr. Todd A. Witzberger, M.D., and the current defendants, St. Paul Fire and Marine Insurance Company (St. Paul), a Minnesota corporation, and Commercial Insurance Service, Inc. (CIS), a West Virginia corporation. St. Paul first removed the case to this court on January 31, 2003, arguing that the plaintiffs had fraudulently joined its co-defendant, CIS.[1] This court entered an order on March 5, 2003 rejecting St. Paul's fraudulent joinder

[1] CIS consented to the removal on the same day.

argument and remanding the case to the state court. On May 21, 2003, the plaintiffs filed a second amended complaint in state court, adding three representative plaintiffs, Dr. Warren Kearney, M.D., and Dr. David R. Peterson, M.D., both Minnesota residents, and Dr. Duane J. Glatz, M.D., a Colorado resident. In addition, the second amended complaint asserted class action claims against the defendants. On June 4, 2003, the defendants filed a second notice of removal, again raising arguments of fraudulent joinder and misjoinder. The plaintiffs filed the current motion for summary remand on June 9, 2003.

An action may be removed from state court to federal court if it is one over which the district court would have original jurisdiction. 28 U.S.C. § 1441(b) (2003). The burden of establishing federal jurisdiction is placed on the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction raises significant federalism concerns, this court must strictly construe removal jurisdiction. *Id*. If federal jurisdiction is doubtful, remand is necessary. *Id*. The time frame for proper removal is as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

28 U.S.C. § 1446(b) (2003) (emphasis added).

It is apparent from the record that the plaintiffs initially filed this case on March 22, 2002. The defendants are now attempting to remove more than one year after the case was filed, in clear violation of the plain language of § 1446(b). The defendants base their argument on an "equitable exception" to the one year rule recognized by the Fifth Circuit in *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, No. 02-10582, 2003 U.S. App. LEXIS 6699 (5th Cir. April 23, 2003). This court disagrees with that ruling, and **HOLDS**, as it has consistently, that it is for Congress, and not the courts, to rewrite § 1446(b). No reasonable lawyer could believe that the Fourth Circuit Court of Appeals, or this court, would not adhere to the plain language of the statute. The Fourth Circuit has said plainly that "[i]n diversity cases, the statute [28 U.S.C. § 1446(b)] . . . erect[s] *an absolute bar* to removal of cases in which jurisdiction is premised on 28 U.S.C. § 1332 'more than 1 year after commencement of the action.'" *Lovern v. GMC*, 121 F.3d 160,163 (4th Cir. 1997) (emphasis added). This blanket prohibition has been recognized repeatedly in this district, and serves the important function of fostering judicial economy:

> In this district, the one year cap of § 1446(b) is recognized to be a jurisdictional limitation that should be rigidly observed to prevent removal of diversity cases that have been pending in state court for more than one year . . . . [T]his limitation applies to all diversity cases pending in state court for more than one year, regardless of whether such cases were removable initially or became removable subsequently.

Whisenant v. Roach, 868 F. Supp. 177, 178 (S. D. W. Va. 1994) (citation omitted); *see also Rashid v. Schenck Constr. Co., Inc.*, 843 F. Supp. 1081, 1088 (S.D. W. Va. 1993). Therefore, applying the unambiguous language of § 1446(b), the court **FINDS** the defendants' second notice of removal is time-barred. Therefore, the plaintiffs' motion to remand is **GRANTED**.

Further, the court **FINDS** that the second notice of removal lacks a good faith basis. While the defendants certainly had a right to reassess their case after the plaintiffs' substantial changes in their second amended complaint, this does not excuse a frivolous second notice of removal more than two months after the jurisdictional bar. The court **FINDS** that the defendants' attempt to remove this case a second time was done with the intent to prolong litigation.[2] Accordingly, the court **FINDS** appropriate and awards just costs and actual expenses, including attorney fees, incurred as a result of the removal. 28 U.S.C. § 1447(c)(2003). The court will take under consideration the amount of fees and costs to be awarded pending plaintiffs' counsel's submission to the court of appropriate documentation and itemization of these costs and fees. Plaintiffs' counsel's itemization of costs and fees is to be submitted to the Court within ten days of the date this order is entered, accompanied by an affidavit stating that the amounts listed therein are accurate to the best of counsel's knowledge.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: June 13, 2003

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JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

[2] In their motion to remand, the plaintiffs point out that a hearing in state court was set for June 5, 2003 to address the plaintiffs' motions to declassify the second amended complaint and to amend the scheduling order to maintain the September 15, 2003 trial date. The defendants filed this notice of removal on June 4, 2003.